PUBLIC SERVANTS AND THE RULE OF LAW

Janet McLean*

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I INTRODUCTION

As with so much of contemporary political and constitutional theory, arguments both for and against judicial review pitch the battle almost exclusively as one between the rule of law and democracy. These debates tend to overlook the role and processes of the executive and bureaucracy. The result is that the executive has been seriously understudied. In this lecture, I ask where the permanent public service sits within the potential conflict between politicians and courts—and in particular how much the public service is an agent for democracy and how much it is, or should be considered, an agent for the rule of law. Where does the public service stand in the contest between democracy and the rule of law? My focus is on judicial review of administrative action rather than the headier issue of judicial review of legislative action in the human rights context. My purpose is to contribute to the identification of the core justifications for judicial review of administrative action which underpin its more technical doctrines.

We do not usually ask questions about the public service *qua* public service in relation to democracy and the rule of law, because for the most part we tend to treat ministers and public servants as an undifferentiated whole. When contemporary populist politicians in the United Kingdom and United States *have* focused on public servants as distinct from the political executive, they have dismissed their expertise—claiming that "Britain has had enough of experts"—or they have branded

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public servants as antidemocratic.[1] It is perhaps no accident that the present United Kingdom government has simultaneously sought to restrict judicial review at the same time as it has sought to subdue and constrain the independence of the permanent public service to make it a more direct instrument of a minister's will.

What are we to make of this democratic attack on the public service and its expertise? My argument is that while democracy may set the whole system in motion, the democratic credentials of the public service *qua* public service do not run very deep at all. Democratic decision-making does not animate everything or even most of what the public service does. The public service mediates between democracy and the rule of law. If anything, it falls, and should fall, much more on the rule of law side of the ledger. The line is often a blurred one, but there is a line. Public servants are creations of law, their relationships with ministers are regulated by constitutional law having its origins in convention and not in employment law, the doctrines of judicial review reinforce their commitment to professionalism, and they serve offices which survive changes in government.

In suggesting that the public service is not particularly democratic, I do not mean to be critical. Many of the qualities we expect of the public service, and which the public service itself espouses, are pre-democratic in origin. Public service values of rationality, impartiality, the duty to provide free, frank and fearless advice to rulers, to act according to fundamental principles of law, and to serve the public interest rather than to seek private gain, were ideals sought to be applied to officials and advisors long before both the modern public service and representative democracy. King John promises in the Magna Carta of 1215 to appoint as certain officials "only men that know the law of the realm and are minded to keep it well".[2] Such qualities are desirable regardless of whether the particular form of rule is a monarchy, an aristocracy or a democracy. Democracy cannot eliminate or cure all the problems associated with governing and may indeed make some worse. Imagine how oppressive it would be if all bureaucratic decisions were made according to majoritarian principles. That would turn everything into a kind of bill of attainder. Executive power and legislative power are distinct and have different features.

Thinking about the central conflict as one between democracy and the rule of law, as we are prone to do, mischaracterises many of the problems associated with executive power as well as their solutions. In system terms, in holding public servants and politicians to account for their different roles, the courts in judicial review are performing a democratic and democratising role. In maintaining the conditions for good advice by public servants to ministers, in supporting impartiality and rationality, and impersonal rule, judicial review of administrative action has the capacity to support these pre-democratic values as well as certain explicitly democratic values encapsulated in the *ultra*

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1 Michael Gove "Britain has had enough of experts" *Financial Times* (online ed, London, 3 June 2016).

2 Magna Carta 1215, art 45.

vires doctrine. In more contemporary parlance, judicial review can and should promote public service professionalism.

I begin with some important aspects of constitutional law to explain how we got to where we are. In the second part, I turn briefly to consider some judicial review cases to illustrate my argument.

II THE CONSTITUTIONAL IDENTITY OF THE PUBLIC SERVICE

Constitutional lawyers do not routinely differentiate between the public service and ministers when we talk about the executive. We tend to treat the public service for the most part as synonymous with the political executive. Ministers lend their democratic credentials to public servants. The public service's interests are treated as the same as those of its ministers, whoever those ministers may be for the time being. Public servants owe them the utmost loyalty. Indeed, the orthodox contemporary view has been that the public service as such has no constitutional personality or responsibility separate from that of the duly constituted government of the day.

The standard democratic account of the executive in Westminster jurisdictions goes something like this:[3] ministers by definition enjoy the confidence of the House of Representatives. Ministers have a duty to Parliament to account, and to be held to account, for the policies, decisions and actions of their departments and executive agencies. While civil servants are at common law servants of the Crown, for all practical purposes the Crown in this context means, and is represented by, the government of the day. Public servants do the legislature's bidding and, failing that, the ministers' bidding. Public servants have no minds of their own under this view. They are dependent on the animating mind of either the legislature or ministers.

The *Carltona* doctrine squares the circle by imputing the actions and sometimes more problematically what is in the mind of the public servant to the minister.[4] Lord Donaldson in *Regina v Secretary of State for the Home Department, Ex parte Oladehinde* suggested that: "The civil servant … acts not as the delegate, but as the alter ego of the Secretary of State".[5] This remarkable elision of the political figure of the minister with the permanent impartial non-partisan official tends to discourage lawyers from looking inside the black box that contains the executive. The combined force of these doctrines suggests that the statutory authority conferred on ministers is presumptively distributed throughout the bureaucracy, but political accountability for such actions is concentrated in

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3 This account is a paraphrase of Robert Armstrong *The Duties and Responsibilities of Civil Servants in Relation to Ministers* (Cabinet Office, London, 1985 as amended on 17 July 1996); and Treasury Board of Canada Secretariat *Review of the Responsibilities and Accountabilities of Ministers and Senior Officials* (Report to Parliament, BT22-100/2005, 2005).

4 The *Carltona* doctrine derives from the 1943 Court of Appeal of England and Wales case: *Carltona Ltd v Commissioners of Works* [1943] 2 All ER 560 (CA).

5 *Regina v Secretary of State for the Home Department, Ex parte Oladehinde* [1991] 1 AC 254 (HL) at 284.

the person of the minister, as if that power had never been so distributed. Doubts have recently been raised about the presumptive status of the doctrine in the United Kingdom Supreme Court case of *Regina v Adams*.[6] There is a question of whether our extensive legislative delegation provisions may displace the *Carltona* doctrine in Aotearoa New Zealand.[7] The point remains that the *Carltona* doctrine contributes to the elision between the political and public service parts of the executive.

The orthodox approach then imagines a kind of democratic chain of command—starting with the people, the legislature, then the executive as an undifferentiated whole. Treating the political executive and the public service administration as a single entity undoubtedly has a certain logic. It lends democratic legitimacy to the public service, reinforces the political responsibility of ministers and is a pragmatic response to the complexities of modern government. But doing so also has the effect of underplaying the constitutional nature of the relationship between public servants and ministers. Orthodox explanations of the executive in the democratic chain of command fail to capture or explain the following:

(1) Cabinet is not just another committee of the whole House. It is quite distinct in a range of ways. It can exercise prerogative powers not conferred on it by Parliament. While it is true that in Aotearoa New Zealand ministers also have to be elected members of Parliament, this is not the case in the United Kingdom where Cabinet ministers can be drawn from the House of Lords, including those appointed just for that purpose.

(2) Only a small percentage of legislation changes as government changes—most legislation stays in force regardless of the party in power. Government is worth winning because primary legislation does not always incorporate government policy, but often allocates and defines powers among various officials. Legislation frequently contains provisions that leave open to different governments the exercise of wide discretion and the application of a range of policies.

(3) There are an increasing number of government agencies for which ministers have little direct responsibility. Chief executives are increasingly publicly answerable. Indeed, in the United Kingdom, permanent secretaries of core departments are responsible and answerable in Parliament for their budgets.

(4) Only a small percentage of government policy originates with the contemporary party in government. Most executive activity is not top-down but originates in the bureaucracy.

(5) Only a small percentage of the budget allocation changes when the government changes.

(6) While it is relatively uncontroversial for ministers to delegate their powers *to act* to the administration, it is more difficult to explain how the public service is able to provide independent professional free and frank *advice* to ministers and to be protected when they do so, if they enjoy no separate identity from the government of the day.

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6 *Regina v Adams* [2020] UKSC 19, [2020] 1 WLR 2077.

7 See Public Service Act 2020, sch 6 cl 2.

(7) Public service legislation in New Zealand, Australia, Canada and the United Kingdom acknowledges that the public service owes duties directly to the public and not just through ministers—though no one seems to be completely sure of what these duties are or how they should be manifest.

(8) Finally, how can it be that public servants do not have separate constitutional identity from that of the government of the day when it is public servants who have constitutional responsibility for the smooth transition between governments and including the operation of the caretaker convention? In what is their *most* democratic and constitutional role public servants must counsel and act independently of ministers.

In short, the fiction that the permanent public service has no separate identity from ministers provides it with a kind of democratic camouflage. It exaggerates its democratic credentials and it obfuscates the place for its proper independence and professionalism.

III MONARCHICAL RATHER THAN DEMOCRATIC?

None of this is particularly surprising. It is common knowledge that the executive branch of government is radically under-theorised. As one United States commentator has suggested, explanations for the administrative state have been retrofitted into the constitutional system.[8] My contribution to that debate is to notice that while adjustments have been made to try to reconcile the administrative state with representative democracy, the administration, especially in Westminster systems, still owes much more to its monarchical origins than it does to democracy. Our executive is still very much monarchical in form.

Ministers are in many ways like princesses or princes in relation to their advisors. Centuries of medieval and humanist thought considered the role of advisors as being to lead princes to virtue, as the conveyors of knowledge to the omnipotent, as preserving stability as monarchs changed with the succession, as contributing capacity to legitimacy, and as ensuring that rule was impersonal and hence not a form of arbitrary and capricious personal rule. To be a judge in one's own cause is one of the earliest grounds on which to impugn a decision. Good counsel was what distinguished the king from the tyrant.

Historically, good counsel was offered in mitigation for the absolute power of the prince, and was instrumental in converting the King's will (the capricious will of a natural man) into the King's authority (an artificial office).[9] Humanists, clergy and some courtiers exhorted advisors to offer free, frank and fearless advice and exhorted princes to maintain conditions under which there was a license

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8 See David H Rosenbloom "Retrofitting the Administrative State to the Constitution: Congress and the Judiciary's Twentieth-Century Progress" (2000) 60 PAR 39.

9 See further Janet McLean "Good Counsel as Constitutional Imperative" in Eoin Carolan, Jason NE Varuhas and Sarah Fulham-McQuillan (eds) *The Making (and Re-Making) of Public Law* (Hart Publishing, Oxford, 2024) (forthcoming).

for counsellors to be free and frank, and not to withdraw that license when princes were displeased. The idea of free and frank advice in the Public Service Act 2020, Official Information Act 1982 and public service codes around the Commonwealth has its origins in 15th century Italian humanist thought,[10] if not in earlier classical and Roman sources. The advice that public servants are ideally expected to provide, then as now, contributes justification, reason and evidence, experience and experiment rather than power. As Thomas Hobbes put it, unlike the power to command, the reason to act in accordance with counsel cannot be separated from the reasons offered in its support.[11]

Counsellors could be bad too—the classical texts are replete with examples of princes ruled by their counsellors. Conditions for good counsel needed to rein them in.

Of course, in comparison to rule by hereditary princes, representative democracy takes some of the luck out of executive government—we no longer have to rely on tears and prayers or to fear infant kings or childless monarchs. But ministers are still "bird[s] of passage".[12] They switch in and out of roles and like princes vary greatly in their knowledge, education and capacity for good rule.

Strikingly, despite the fact that we are a democracy, the considerable resources of the public service are used almost exclusively to advise *ministers*, not legislatures or the public more generally. Such advice happens mostly in private, often under conditions of confidence, and ministers in large part maintain control over how much and which of that advice is revealed to Parliament and to the public—just as monarchs used to do.

Our familiarity with the status quo breeds just that—familiarity. We tend not to notice how remarkably parsimonious our constitutional system is about how much advice is given in public and to the public who putatively are sovereign in a democracy. Of course, ministers advise Parliament, but that "advice" is backed by the government whips and is not truly advice at all, but rather is more often a kind of command. Section 7 reports under the New Zealand Bill of Rights Act 1990 to the House from the Attorney-General may be much closer to real advice—but that is certainly not the norm, and they demonstrate, if anything, just how difficult it is to give advice to a collective riven by faction. The Waitangi Tribunal, Climate Change Commission, Law Commission, and royal commissions of inquiry are among the exceptions to this rule in that they give advice publicly.

Exceptions apart, despite the fact that we are a democracy, the executive branch continues to owe much to its monarchical antecedents. This is all to establish, then, that it really matters if the initial

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10 Baldassare Castiglione *The Courtyer of Count Baldessar Castilio* (Thomas Hoby (translator), William Seres, London, 1561) at 261.

11 Thomas Hobbes *Leviathan* (JCA Gaskin (ed), Oxford University Press, Oxford, 1998) at ch xxv.

12 This quote comes from Sir George Lewis, Chancellor of the Exchequer and Home Secretary in the mid-19th century, who is mentioned as so describing ministers in Walter Bagehot *The English Constitution* (Chapman and Hall, London, 1867) at 249.

advice ministers receive is bad, mere flattery which tells the ministers solely what they want to hear, uninformed or does not reach ministers at all.

There have been a number of attempts to make the public service itself more democratic. Ultra vires doctrines can sometimes play a large role here—public servants must obey legislation. But as I have already indicated, legislation is not always particularly controlling. The 19th century reforms to replace patronage with open merit-based appointments and promotions were considered democratic at the time (though that was not always considered a compliment). Since then, there have been attempts to better reflect the population as a whole in the personnel of the public service. If you want a reminder of how difficult the public service has been for Māori, *Poananga v State Services Commission* makes pretty uncomfortable reading.[13] In the past 15 years or so there have been numerous attempts to create relationships directly between the public service and the public, including through different kinds of citizens' charters, and various duties of consultation ranging from duties akin to United States "notice and comment"-like processes with named stakeholders to much vaguer duties to consult interested persons, and constitutional obligations to consult tangata whenua.

Indeed, in all the major Westminster-derived systems—Australia, New Zealand, Canada and the United Kingdom—public service legislation acknowledges that public servants ultimately serve the community, the people or sometimes "the Crown" understood in this context as a proxy for the people and the longer term interests of the state. In the Supreme Court of Canada case of *Fraser v Public Service Staff Relations Board*,[14] Dickson CJ would have allowed public servants a measure of legal protection when making certain kinds of public criticisms of governments (for instance, about the legality of government's actions, or threats to the life, health or safety of the public) even in the absence of whistle blower legislation.[15] Lorne Sossin reads the Court as:[16]

> recogniz[ing] that the civil servant's duty of loyalty to the Crown, and through the Crown to the public interest, must in some circumstances be a higher obligation than the duty of loyalty owed to the government of the day.

Ian Bancroft, a former head of the United Kingdom civil service, puts the matter even more directly: "The Service belongs neither to politicians nor to officials but to the Crown and to the

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13 *Poananga v State Services Commission* [1985] 2 NZLR 385 (CA).

14 *Fraser v Public Service Staff Relations Board* [1985] 2 SCR 455.

15 There are now legislative provisions in pt 7 of the Public Service Employment Act SC 2003 c 22.

16 Lorne Sossin "Speaking Truth to Power? The Search for Bureaucratic Independence in Canada" (2005) 55 UTLJ 1 at 13.

nation."[17] Much of the case law actually finds against public servants who speak out,[18] including in *Fraser* itself.[19] Mr Fraser was against the evils of metrification. Nevertheless, the idea that public servants owe a higher duty to the public interest and the people (the contemporary political sovereign) "will not die".[20]

Surprisingly, the notion that public servants are servants of the Crown representing the people—in theory at least—also owes more to medieval and early modern theories of monarchy than it does to democracy. Judicial decisions can be found even in the 18th century which talk about the duties administrative officials owe to the public as servants of the Crown.[21] The terminology is difficult to apply here. In Aotearoa New Zealand, we could perhaps think about the public service as serving treaty peoples.

Even cumulatively, none of the attempts to democratise the public service *qua* public service really go very far in practice or are very convincing. Untethered from ministerial responsibility—and the public service is increasingly frequently untethered from ministerial responsibility—the public service is not very democratic at all. More than that, public servants need to be untethered from democracy to some degree in order to be able to give independent free and frank advice, and to be impartial in relation to facts and to people.

The possibility of holding the executive to account in judicial review, then, may itself be one of the more democratic features of our constitution. Law and democracy are intimately woven together. Holding advisors publicly to account is a distinctly democratic feature of our system which originates in classical Greek democracy. Orators and advisors to the assembly were held to account for their advice to the *demos* even if that advice was not taken. One of the reasons for holding advisors to account and requiring them to justify their advice was that citizens voting but not speaking in the assembly or citizens serving as jurors could not themselves be asked to explain or justify their votes. The *demos* itself enjoyed the privilege of unaccountability and thus was capable of tyranny—so the

17 Cited in Alex Thomas and others *A new statutory role for the civil service* (Institute for Government, London, March 2022) at 11.

18 See for example *Comcare v Banerji* [2019] HCA 23, (2019) 267 CLR 373.

19 *Fraser v Public Service Staff Relations Board*, above n 14.

20 RAW Rhodes and Patrick Weller *The Changing World of Top Officials: Mandarins or Valets?* (Oxford University Press, Oxford, 2001) at 118.

21 See my discussion of this case law (including criminal law) in Janet McLean "The Authority of the Administration" in Elizabeth Fisher, Jeff King and Alison Young (eds) *The Foundations and Future of Administrative Law: Essays in Honour of Paul Craig* (Oxford University Press, Oxford, 2020) 45 at 53–61.

controls focused on the advisory aspect of decision making—the constituent parts rather than the whole.[22]

To sum up the argument so far, public servants' claims to democratic legitimacy do not run very deep at all once untethered from ministers. And they are in fact untethered from ministers much more frequently than we acknowledge. In order to objectively inform policy processes or to give free and frank advice at all, public servants are required to act independently. For most purposes, public service advice is given privately and public access to it is controlled by ministers.

Many of the agreed expectations of the modern public service—impartiality in relation to the public, impersonal rule, working for the public good rather than for their own private interests or the private interests of ministers, an ability to give advice which is free and frank—all predate modern representative democracy and the modern public service. Such expectations are not *anti*democratic: they represent an ideal standard for advice-giving and executive government under all forms of rule. Democracy does not cure all the problems of government or remove the threat of tyranny. Public servants in New Zealand, Australia, the United Kingdom and Canada continue to espouse such standards, and these are often also reproduced in legislation or codes of ethics. Modern managerialism has undoubtedly put pressure on these ideas, and has also sometimes devalued professional expertise.

IV THE DEMOCRATISING ROLE OF JUDICIAL REVIEW

What, then, is or should be the role of the courts? Judicial intervention in cases falling sufficiently short of the declared standards of the public service may be one of the more democratic aspects of modern representative democracy. These are not standards imposed on public servants, but support commitments that the public service has internalised, such as honesty, objectivity, fairness and evidence-based policy.

Judicial review of administrative action is capable of both conferring legitimacy and enhancing political processes which otherwise mostly take place in private and in a monarchical form. Lawyers do not tend to talk about what they are doing in this language of good counsel or free and frank advice, but I think that such concepts may nevertheless be central to at least some of the judicial review doctrines, and may need to be given greater purchase in light of the challenges modern representative democracy currently faces.

There are of course intricate legal rules about when and how advice may be judicially reviewable. Sometimes cases in judicial review are able to consider the advisory process through an attempt to review the decision ultimately made. In more limited cases, such as the recent Climate Change Commission decision, the advice by itself may be judicially reviewable, though in that case the advice

22 See Matthew Landauer *Dangerous Counsel: Accountability and Advice in Ancient Greece* (University of Chicago Press, Chicago, 2019) at 48.

did not originate in the core public service.[23] My sense is that the reviewability of advice per se is likely to expand for three reasons: (i) as a means to protect the professionalism and independence of the public service itself from ministerial overreach if politics should become increasingly populist and polarised as it has elsewhere; (ii) in response to the necessity for making more advice publicly available because of the challenges humanity is currently facing; and (iii) in ensuring te ao Māori is taken into account. Focusing on advice in the decision-making process can provide a degree of clarity both in relation to existing judicial doctrines and also open up new possibilities. It is orthodoxly procedural, but potentially far-reaching, and does not depend on an a priori standard of review.

Even if I have failed to convince you about the continuing monarchical nature of the executive, you may be willing to accept another general proposition. In most cases of judicial review of administrative action, the more the process of decision-making is disaggregated into its advisory and its decision-making components, the more accountability there will be. To be clear, this is part of the architecture of judicial review (though *not*, I should add, of the New Zealand Bill of Rights Act or Te Tiriti o Waitangi).

I want to turn now briefly to consider four existing judicial review cases which open up the advisory process. I am not focusing on legal advice in these examples. In many ways legal advice is *sui generis* because it is uniquely subject to effective independent public evaluation in legal proceedings. Law is, and should be, in everything public servants do.

My first example is of the "qualified *Carltona*" doctrine. Ministers may devolve their statutory tasks to others, but if they choose to rely on agents, those agents have to perform those tasks to a certain standard or the whole of the decision may be able to be impugned. In the New Zealand Court of Appeal case of *Daganayasi v Minister of Immigration*, Cooke J (as his Lordship then was) looked inside the decision-making process to the respective roles of advisor and decision-maker.[24] The statutory power at issue was conferred on the Minister in the form of a humanitarian discretion to grant a reprieve from a deportation order. It was accepted that the ultimate decision was one to be exercised by a politician and not a public servant. Cooke J said that this did not mean that the Minister should himself have to gather all the evidence personally—he could ask a suitably qualified expert advisor to do so on his behalf. In this case, an independent medical assessor undertook the task and adopted prejudicial findings which contradicted the medical advice of those more intimately acquainted with the case.

The Court of Appeal held that given that the health of a child was at stake, it was a breach of fair process to have adopted prejudicial findings without disclosing them to the applicant and offering her a chance to respond. Cooke J's additional finding (not shared by the rest of the Court) was that the decision-maker had made errors of fact. His Honour said (and this is the part I am particularly

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23 See *Lawyers for Climate Action New Zealand Inc v Minister of Climate Change* [2023] NZHC 1835.

24 *Daganayasi v Minister of Immigration* [1980] 2 NZLR 130 (CA).

interested in) that while the Minister did not have to seek out the evidence personally, if a minister relies as part of the statutory inquiry or decision on a suitably qualified medical assessor, then the facts on which he relies must be correct. Bad or materially incomplete evidence would infect the whole of the decision.

One may be tempted to think that the public servant was hung out to dry here while the Court seemed concerned to maintain the Minister's dignity. But another way to look at this is as an example of the Court maintaining and supporting the independence of the fact-finding aspect of the advisory process, against any pressure—real or imagined—on the advisor to tell the Minister what he or she wanted to hear. Such an approach not only upholds standards of rationality, but creates incentives against ministerial overreach.

The second example is of *Carltona* gone wrong. This example demonstrates what can happen when one fails to properly distinguish between ministers and public servants as distinct constitutional entities, at least where advice is concerned. The United Kingdom government attempted to apply alter ego principles in a perverse way. The matter in *R (National Association of Health Stores) v Department of Health* arose in relation to the question of whether kava-kava—a herbal remedy used to relieve stress and anxiety and boost sleep—should be prohibited.[25] A Medicines Commission had been established under legislation to advise the Minister (independently of the Department), and the Minister was statutorily required to consult the Commission before making an order. One member of the Commission had made a study into kava-kava and recommended that it should not be prohibited. The Department never informed the Minister of the member's views. The High Court judge held that it was sufficient that the responsible civil servants were aware of the expert's view, and that they were in the room when the Minister made his decision. *They did not have to actually communicate that knowledge to the Minister.* On appeal, Sedley LJ made robust work of refuting that argument. The idea that the official's knowledge could be imputed to the Minister for the purpose of fulfilling the administrative law standard that the Minister had considered all of the relevant considerations is, his Lordship said:[26]

> … antithetical to good government. It would be an embarrassment both for good government and for the courts if we were to hold that a minister or a civil servant could lawfully take a decision on a matter he or she knew nothing about because one or more officials in the department knew all about it. The proposition becomes worse, not better, when it is qualified … by requiring that the civil servants with the relevant knowledge must have taken part in briefing the minister. To do this is to substitute for the *Carltona* doctrine of ordered devolution to appropriate civil servants of decision-making authority … either a de facto abdication of the lawful decision-maker in favour of his or her advisor, or a division of labour in

25 *R (National Association of Health Stores) v Department of Health* [2005] EWCA Civ 154.

26 At [26].

> which the person with knowledge decides nothing and the decision is taken by a person without knowledge.

Conflating advice with decision-making can lead us into trouble. It is not enough to have experts involved—their expertise needs to be communicated to decision-makers.

These first two cases may be relatively easy examples, because they rely on "scientific" type evidence to which ministers are otherwise unlikely to have personal access, and in the latter case specialist expertise is being brought in from outside the public service. But there is likely to be a broad range of advice and evidence gathering from within the core civil service which requires a similar degree of independence and expertise. My final two examples do not feature specialist advice, but touch upon the advisory process, nonetheless.

The third example is of a different kind—where the administrative state takes too much upon themselves and renders the decision-maker's and consulted public's role meaningless. The United Kingdom Supreme Court case of *Regina (Moseley) v Haringey London Borough Council* was framed as a challenge to the way a statutory duty to consult had been conducted.[27] Ultimately, the challenge was successful because the Court found that something had gone wrong in a public law sense. The dispute arose out of austerity measures after the Global Financial Crisis. Central government decided it would no longer fully reimburse local councils for means tested council tax relief. An official in Haringey—one of the poorest local councils in England—gave the Council only one option to deal with the shortfall, which was to reduce tax relief. He never fully considered any alternative means to meet the shortfall, such as reducing services. He then set out to consult those currently on benefits about which beneficiary groups should have their relief reduced. Lord Reed found that the consultation was defective in a public law sense because those consulted should have been given information about the draft scheme, some sense of realistic alternatives to that scheme and the main reasons for preferring the draft scheme. His Lordship found that to be meaningful, the consultation should have informed people of "what the proposal is and exactly why it is under positive consideration, telling them enough to enable them … to make an intelligent response".[28] That seems to me to be a recipe for good counsel equally of politicians and citizens.

And finally, consider the notorious Brexit case of *Regina (Miller) v Prime Minister (Lord Advocate intervening)*, commonly known as *Miller No 2*, in the United Kingdom Supreme Court.[29] Admittedly, it is not a case in which the political executive was disaggregated from the public service

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27 *Regina (Moseley) v Haringey London Borough Council* [2014] UKSC 56, [2014] 1 WLR 3947.

28 *Regina v North and East Devon Health Authority, Ex parte Coughlan* [2001] QB 213 (CA) at [112] per Lord Woolf MR as quoted with approval by Lord Reed in *Regina (Moseley) v Haringey London Borough Council*, above n 27, at [39].

29 *Regina (Miller) v Prime Minister (Lord Advocate intervening)* [2019] UKSC 41, [2020] AC 373.

branch of the executive, but a process of disaggregation of the executive was at work and with far-reaching consequences.

Earlier authority had cited with approval Dicey's classic definition of the prerogative:[30]

> The prerogative [says Dicey] is the name for the remaining portion of the Crown's original authority, and is therefore … the name for the residue of discretion left at any moment in the hands of the Crown, *whether such power be in fact exercised by the King himself or by his Ministers*.

Dicey's definition treats ministers and the Monarch as an undifferentiated whole—as interchangeable. He reflects the political understanding that the Monarch routinely acts on the advice of ministers and so far as possible is politically neutral. The absence of any distinction between ministers and the Monarch here effectively eviscerated older constitutional distinctions between counsel and command. In *Miller No 2*, however, the United Kingdom Supreme Court's unanimous rejection of this apparently orthodox conflation of the Monarch and Her Majesty's advisers was critical to its reasoning. The Court was able to disaggregate the Prime Minister's advice to the Queen from Her Majesty's exercise of the prerogative in proroguing Parliament in reliance on that advice. The novel opening move here was for the Court to look inside the *executive* and to analytically separate two of its elements. The Court found that:[31]

> [i]t is impossible for us to conclude, on the evidence which has been put before us, that there was any reason — let alone a good reason — to advise Her Majesty to prorogue Parliament for five weeks.

Whether one agrees with the decision or not, the critical move in the reasoning, then, was to separate the advisory function from the exercise of the prerogative itself (at least as far as that advice was disclosed to the Court).

Separating advice from decision-making then, can have far-reaching effects. It does not attract any gate way deference or preliminary consideration of the applicable standard of review, though deference may come in later. It focuses on good decision-making processes, and it respects the different roles of those involved. Ministers may still be able lawfully to decline to follow the advice of their public servants—though not always—depending on the application of established principles.

V CONCLUSION

A focus on the public service and on the advisory processes in executive decision-making upsets the familiar polarity between democracy and the rule of law. Criticising the public service or the courts for being antidemocratic risks mischaracterising the nature of executive power and ignores its

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30 AV Dicey *Law of the Constitution* (8th ed, Macmillan & Co, London, 1915) at 421 (emphasis added) as cited with approval in *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 (HL) at 385 and the cases cited therein.

31 *Regina (Miller) v Prime Minister (Lord Advocate intervening)*, above n 29, at [61].

essentially monarchical form. The supervisory jurisdiction of judicial review is able to deliver legitimacy, good government and a democratic element.